Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Section 402(b)(1)(A)	)	
of the Telecommunications Act of 1996	)	**CC Docket No. 96-115**
	)	

MCI OPPOSITION TO SWBT PETITION FOR RECONSIDERATION

I. INTRODUCTION

MCI Telecommunications Corporation (MCI) hereby submits its opposition to Southwestern Bell Telephone Company's (SWBT's) petition for reconsideration of the Commission's Report and Order in the above-captioned proceeding (Order). The Order adopts rules to implement section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 (1996 Act), which adds section 204(a)(3) to the Communications Act (the Act). Petitions for reconsideration were also filed by MCI and AT&T Corp. (AT&T).

II. THE TERM "DEEMED LAWFUL" SHOULD NOT BE GIVEN CONCLUSIVE EFFECT

SWBT argues that the phrase "deemed lawful" in the new subsection 3 of Section 204(a) of the Act should be given conclusive effect, so that local exchange carrier (LEC) streamlined tariffs generally could not be challenged, even prospectively, in formal complaint proceedings brought under Section 208 of the Act. SWBT points out that the

Order states that "deemed lawful" means that LEC streamlined tariffs are "'conclusively presumed to be reasonable'"[1] but then allows complaints to be brought against such tariffs for prospective relief. SWBT suggests that the Order is thus internally inconsistent and requests that the Commission follow through on its characterization of "deemed lawful" by prohibiting Section 208 complaints against LEC streamlined tariffs altogether. Significantly, SWBT provides no reasons for its view that "deemed lawful" should be interpreted to preclude all Section 208 remedies.

The problem with SWBT's approach is that its conclusion does not follow from its premises. It is true, as MCI pointed out in its Petition for Reconsideration, that, notwithstanding the rhetoric in the Order, the effect given "deemed lawful" is only that of a time-limited presumption, although one that cuts off any right to retroactive damages. It does not follow, however, that the Commission should follow its rhetoric, as SWBT suggests, and make the presumption conclusive for all time. Rather, as MCI argued, the limited presumptive effect that the Order gives to the phrase "deemed lawful" shows that those words do not compel any particular interpretation. In effect, there are now three suggested interpretations of that phrase: the Commission's interpretation in the Order; the other interpretation suggested in the NPRM and supported by MCI and other parties; and SWBT's extreme view. That variety negates any argument that the "plain meaning" of Section 204(a)(3) allows only one interpretation. Indeed, the difference between the Commission's reading and that of MCI and other non-LEC parties is one of degree -- whether the carrier may be subjected to damages, once the presumption is rebutted, for

[1]SWBT Petition at 2, quoting Order at ¶19.

the entire period that the tariff has been in effect or is subject only to prospective damages at that point.

This range of possible interpretations requires the Commission to follow the standard rules of statutory construction applicable to ambiguous language. In expounding this provision, the Commission therefore "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[2] "[C]ongressional intent can be understood only in light of the context in which Congress enacted a statute and the policies underlying its enactment."[3] The Commission accordingly must reach issues of statutory context, structure and intent that it avoided in its analysis in the Order by incorrectly assuming that its interpretation of deemed lawful was compelled by the plain meaning of the words in that provision.

As MCI argued in its Petition, the only interpretation of "deemed lawful" that is consistent with the structure and legislative history of the 1996 Act is one under which the procedures to be applied to LEC tariffs are streamlined, rather than one that reverses a century of administrative law relating to remedies for unreasonable common carrier rates. Thus, that phrase simply establishes higher burdens for suspensions and investigations, such as by "presuming" LEC tariffs to be lawful. MCI's approach is confirmed by the absence of any contrary argument in SWBT's Petition supporting its own preference, other than pointing out the inconsistency between the Order's rhetoric and its effect. SWBT's failure is easily explained, however, in light of the variety of interpretations

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[2] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956).

[3] Tataronowicz v. Sullivan, 959 F.2d 268, 276 (D.C. Cir. 1992).

already given "deemed lawful" in this proceeding, with SWBT's view being the latest. As SWBT does not challenge the Commission's interpretation as being contrary to the plain meaning of the statutory language, SWBT is thereby implicitly conceding that "deemed lawful" is ambiguous, requiring the Commission to review such considerations as statutory context, structure and intent, as mentioned above. Since application of those factors could not possibly result in SWBT's reading of "deemed lawful," SWBT does not even bother to discuss them.

For example, SWBT cavalierly states that its view does not "preclude complainants from filing Section 208 complaints against a carrier for acts that allegedly violate the Communications Act other than those where a carrier is merely applying a tariffed rate or practice."[4] For all practical purposes, of course, this would mean that Section 208 complaints against LECs are precluded in virtually all cases, since almost everything that a carrier does is "applying a tariffed rate or practice." As MCI explained in its Petition, it is inconceivable that the Commission intended to upset a century of administrative law applicable to common carriers without any hint in the statutory provision most affected by the change, namely, Section 208. Since SWBT's interpretation of "deemed lawful" -- eliminating the complaint remedy for LEC streamlined tariffs altogether, rather than simply limiting it to prospective relief -- is even more extreme than the Commission's reading, it is even more unlikely that Congress would have eviscerated the Section 208 remedy without reflecting that change in Section 208 itself. In fact, all of the arguments presented in MCI's Petition against the Commission's interpretation of

[4]SWBT Petition at 2.

"deemed lawful" apply even more strongly to SWBT's more extreme view. MCI respectfully refers the Commission to its Petition for that discussion.[5] SWBT's request to insulate LEC streamlined tariffs from any Section 208 review forever should be denied.

III. THE COMMISSION SHOULD REJECT SWBT'S EFFORT TO FURTHER RESTRICT ACCESS TO TARIFF COST SUPPORT

In Appendix B of the Order, the Commission provides a standard protective order for use in the review of LEC tariff filings submitted pursuant to section 204(a)(3) of the Order. The Bureau will use the protective order where the submitting party includes with the tariff filing a showing by a preponderance of the evidence to support its case that the data should be accorded confidential treatment consistent with the provisions of the Freedom of Information Act (FOIA) or makes a sufficient showing that the information should be subject to a protective order.[6]

In its petition for reconsideration, SWBT argues that the standard protective order is deficient, and advocates further limitations on the disclosure of cost support.[7] The Commission should reject this argument. As MCI demonstrated in its petition for reconsideration, the liberal use of protective orders permitted by the Order is already inconsistent with Commission rules requiring dominant carriers to file public cost support.[8]

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[5]MCI Petition at 6-14.

[6]Order at ¶91.

[7]SWBT Petition at 3.

[8]MCI Petition at 15-18.

Accordingly, the Commission should not modify the standard protective order to place still more restrictions on access to tariff cost support data.

SWBT argues that the standard protective order should forbid the making of copies.[9] However, the copying of cost support data is necessary to facilitate review and analysis of proposed rates by the incumbent LECs' customers. Furthermore, the standard protective order places sufficient safeguards on the copying of sensitive information. The standard protective order limits the authorized representatives that may have access to the confidential data, and specifically requires the reviewing party's authorized representatives to maintain a written record of any copies made and to provide this record to the submitting party upon reasonable request.[10] In addition, the standard protective order provides for Commission sanctions for violation of the protective order.[11]

SWBT also asserts that the Order thwarts the intent of the Telecommunications Act of 1996 and the FOIA by "apparently requiring a waiver of some confidentiality rights in exchange for streamlined filing."[12] SWBT argues that the Commission should adopt procedures that allow LECs to file streamlined tariff changes without requiring them to compromise complete confidentiality of their sensitive information.[13] However, nowhere in its petition does SWBT suggest what these procedures might be. Moreover, the

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[9]SWBT Petition at 3.

[10]Standard Protective Order at ¶9.

[11]Order at ¶94.

[12]SWBT Petition at 4.

[13]Id.

standard protective order adequately protects the confidentiality interests of the incumbent LEC by preventing disclosure to persons in a position to use the information for competitive commercial or business purposes.[14] Under current competitive conditions, there is no justification for creating a procedure that would allow incumbent LECs to restrict all public access to cost support on a routine basis.

SWBT suggests that the standard protective order does not address the situation where manufacturers assert confidentiality rights over information required by the Commission.[15] However, the inclusion of manufacturer-specific pricing data in tariff cost support is not a common occurrence. In addition, the Commission has employed protective orders in the past to protect manufacturers' confidentiality interests. In a 1994 letter ruling, for example, the Common Carrier Bureau observed that "[w]hile we recognize that equipment vendors might prefer absolute protection for their prices, we believe that limited disclosure under a protective order reasonably assures that confidential price information will not be used for competitive purposes."[16] The standard protective order, with its prohibition on disclosure to persons in a position to use the information for competitive commercial or business purposes, is sufficient to protect vendors' competitive interests.

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[14]Standard Protective Order at ¶7(b).

[15]SWBT Petition at 3-4.

[16]Letter from Kathleen M.H. Wallman to Jonathan E. Canis, et al., FOIA Control Nos. 94-310, 325, 328, November 1, 1994, at 6.

IV. SECTION 204(a)(3) PERMITS ANNUAL ACCESS FILING TRPs TO BE FILED 90 DAYS PRIOR TO JULY 1

The Order requires price cap LECs to continue filing the Tariff Review Plan (TRP) for their annual access filing 90 days prior to July 1 of each year, but rate information need not be included.[17] SWBT argues that the Commission should reconsider this decision because "[e]arly filing of TRPs, even absent rate information, will result in early notification of the rate reductions that will subsequently be required when the proposed price cap indices are less than the current price cap indices."[18]

The requirement that the PCIs be filed 90 days prior to July 1 falls well short of providing "early notification" of rate reductions. At most, if the new Price Cap Index is below the existing Actual Price Index (API), the TRP would reveal the minimum aggregate change in rates in order for the carrier to continue pricing below cap. However, it would not reveal which rates will change or how far below cap the carrier will decide to price its services. Consistent with the statute, the LECs will not be required to file any "revised charge" until 7 or 15 days prior to July 1. Furthermore, if the current API is below the new PCI, the TRP will provide no information at all about the direction of the LEC's rates. The 90 day notice period does, however, provide the Commission and the public sufficient time to determine whether the LEC has correctly applied Commission rules in calculating its new PCIs. The Commission should retain the requirement that price cap LECs file their PCI information 90 days prior to July 1, and should also clarify

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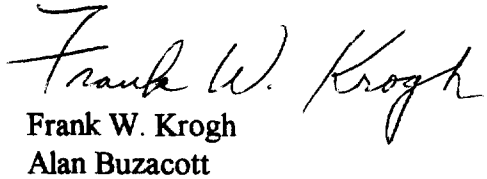
[17]Order at ¶102.

[18]SWBT Petition at 5.

that it has the authority to require advance filing of PCI calculations associated with mid-year exogenous cost changes.[19]

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION



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[19]MCI Petition at 20-21; AT&T Petition at 13.

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that copies of the foregoing "MCI Opposition to SWBT Petition for Reconsideration" were sent via first class mail, postage paid, to the following on this 10th day of April, 1997.

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